

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

INDEPENDENCE REALTY TRUST, INC., )  
INDEPENDENCE REALTY OPERATING )  
PARTNERSHIP, LP, )

Plaintiffs, )

v. )

USA CARRINGTON PARK 20, LLC, )

Defendant. )

C.A. No. N20C-07-316 FWW

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EDMOND F. BROVELLI, JR., Individually )  
and as Trustee of the BROVELLI )  
FAMILY TRUST 2A, )

Plaintiffs, )

v. )

INDEPENDENCE REALTY OPERATING )  
PARTNERSHIP, LP, a Delaware limited )  
partnership; INDEPENDENCE REALTY )  
TRUST, INC., a Maryland corporation; )  
INDEPENDENCE REALTY ADVISORS, )  
LLC, a Delaware limited liability company; )  
IRT CARRINGTON APARTMENTS )  
OWNER, LLC, a Delaware limited liability )  
company, )

Defendants. )

Submitted: March 22, 2022  
Decided: March 31, 2022

**ORDER**

*Upon Defendants' Motion for Reargument*  
**DENIED.**

James S. Green, Jr., Esquire, Jared T. Green, Esquire, SEITZ, VAN OGTROP & GREEN, P.A., 222 Delaware Avenue, Suite 1500, Wilmington, DE 19801, Attorneys for Plaintiffs Edward F. Brovelli, Jr., Individually, and as Trustee of The Brovelli Family Trust 2A and Defendant USA CARRINGTON PARK 20, LLC.

Gregory F. Fischer, Esquire, COZEN O'CONNOR, 1201 North Market Street, Ste. 1001, Wilmington, DE 19801; John J. Sullivan, Esquire, COZEN O'CONNOR, 3 WTC, 175 Greenwich Street, 55<sup>th</sup> Floor, New York, NY 10007, Attorneys for Defendants Independence Realty Operating Partnership, LP, Independence Realty Trust, Inc., Independence Realty Advisors, LLC, and IRT Carrington Apartments Owner, LLC and Plaintiffs Independent Realty Trust, Inc., and Independence Realty Operating Partnership, LP.

**WHARTON, J.**

This 31<sup>st</sup> day of March 2022, upon consideration of the Motion for Reargument of Defendants Independence Realty Operating Partnership, LP (“IROP”), Independence Realty Trust, Inc. (“IRT”), Independence Realty Advisors, LLC, and IRT Carrington Apartments Owner, LLC (collectively “Defendants”)<sup>1</sup>; the Objection to Defendants’ Motion for Reargument of The Brovelli Family Trust 2A (the “Brovelli Trust”)<sup>2</sup>; and the record in this case, it appears to the Court that:

1. According to the Complaint, on March 3, 2017, IROP entered into a Fifth Amended and Restated Agreement of Limited Partnership of Independence Realty Operating Partnership, LP (“Operating Agreement”) with IRT as the general partner, and IRT Limited Partner, LLC and IRT as limited partners.<sup>3</sup> On May 2, 2014, IROP entered into a Contribution Agreement (Carrington Park – 1801 Champlin Drive, Little Rock, Arkansas) (“Contribution Agreement”) with several contributors, including USA Carrington Park 20, LLC.<sup>4</sup> On January 29, 2015, USA Carrington Park 20, LLC, the Brovelli Trust and Edmund F. Brovelli, Jr. entered into a Transfer Agreement whereby USA Carrington Park 20, LLC (a limited partner of IROP) transferred 100% of its interest in IROP to the Brovelli Trust.<sup>5</sup> The Complaint

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<sup>1</sup> Mot. for Rearg., D.I. 27.

<sup>2</sup> Obj. to Mot. for Rearg., D. 29.

<sup>3</sup> Compl., at ¶ 6.

<sup>4</sup> *Id.*, at ¶ 7.

<sup>5</sup> *Id.*, at ¶ 8.

asserts this agreement acted to substitute the Brovelli Trust as a limited partner of IROP.<sup>6</sup> The Complaint further alleges that the Defendants represented that the real estate assets used to acquire the interest in IROP would not be sold for a period of seven years (“the lock-out period”) absent an Internal Revenue Code § 1031 exchange.<sup>7</sup> In 2019, Defendants, without notice according to the Complaint, sold the underlying assets without a § 1031 exchange resulting in claimed damages in excess of \$750,000.<sup>8</sup> Finally, the Complaint alleges that the Operating Agreement and the Contribution Agreement contractually require the Defendants to indemnify the Plaintiffs against any breach of a representation of those agreements, and despite demands for indemnification, Defendants have refused.<sup>9</sup>

2. The Defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.<sup>10</sup> Among other things, the motion argued that the Brovelli Trust lacked standing to bring its breach of contract claim because it was not a party to the Contribution Agreement and the Contribution Agreement’s anti-assignment clause prohibited USA Carrington Park 20, LLC from assigning its

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, at ¶¶ 10, 24-26.

<sup>8</sup> *Id.*, at ¶¶ 11, 29.

<sup>9</sup> *Id.*, at ¶ 46.

<sup>10</sup> Mot. to Dismiss, D.I. 19.

interest in IROP to the Brovelli Trust.<sup>11</sup> On March 1, 2022, the Court denied in part the Defendants' motion.<sup>12</sup>

3. The Defendants move for reargument under Superior Court Civil Rule 59(e).<sup>13</sup> The motion argues that the Court's Order denying their motion to dismiss did not address what they refer to as the "dispositive contractual clause" of the Contribution Agreement prohibiting assignments.<sup>14</sup>

4. The Brovelli Trust first argues that the motion fails under Rule 59(e) because it does not allege, as the rule requires for reargument, that the Court overlooked controlling legal precedent or principles, or misapprehended the law or facts as would affect the outcome of the challenged ruling.<sup>15</sup> It next contends that the motion does not raise new issues, but merely rehashes old ones previously argued in the motion to dismiss.<sup>16</sup> Lastly, it argues the Court did not overlook the anti-assignment provision when it denied the motion.<sup>17</sup>

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<sup>11</sup> Mot. to Dismiss, D.I. 19.

<sup>12</sup> *Independence Realty Trust, Inc., et al. v. USA Carrington Park 20, LLC; The Brovelli Family Trust 2A v. Independence Realty Operating Partnership, LLP, et al.*, 2022 WL 625293 (Del. Super. Ct Mar. 1, 2022). The Court granted the motion as to the claims of Edmond F. Brovelli, Jr., individually as well as to other claims, the dismissal of which was not contested.

<sup>13</sup> Mot. for Rearg., D.I. 27.

<sup>14</sup> *Id.*, at 1-2.

<sup>15</sup> Obj. to Mot. for Rearg., at 1-2, D.I. 29.

<sup>16</sup> *Id.*, at 3-4.

<sup>17</sup> *Id.*, at 4-6.

5. In its Memorandum Opinion and Order, the Court looked to Article 11 of the Operating Agreement governing transfers referring to when a Limited Partner ““purports to assign all or any part of its Limited Partnership Interest to another Person, and includes a sale, assignment, gift, pledge, encumbrance, hypothecation, mortgage, exchange or any other disposition by law or otherwise.””<sup>18</sup> The Court further noted that the Transfer Agreement contemplated that the Brovelli Trust would become a “substituted Limited Partner.”<sup>19</sup> Under the Operating Agreement, a transferee who has been admitted as a Substituted Limited Partner “shall have all the rights and powers and be subject to all the restrictions and liabilities of a Limited Partner under this Agreement.”<sup>20</sup> The Complaint alleges that the Brovelli Trust became a Substituted Limited Partner of IROP, an allegation that the Court took as true, as it must when resolving a Rule 12(b)(6) motion to dismiss.<sup>21</sup> The Court held that as a Substituted Limited Partner, the Brovelli Trust had all of the “rights and powers” that USA Carrington Park 20, LLC had.<sup>22</sup> It concluded that, if USA Carrington Park 20, LLC had standing to sue, so did the Brovelli Trust.<sup>23</sup>

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<sup>18</sup> *Independence Realty Trust*, at \*3 (quoting Operating Agreement at § 11.1(a)(i), Defs.’ Mot. to Dismiss, Ex. B).

<sup>19</sup> *Id.*, (citing Pls.’ Ans. Br. in Opp, Ex A, at ¶¶ 2-4, D.I. 23).

<sup>20</sup> *Id.*, (quoting Operating Agreement at § 11.4(b), Defs.’ Mot. to Dismiss, Ex. B)

<sup>21</sup> *Id.*.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

6. Pursuant to Superior Court Civil Rule 59(e), a motion for reargument will be granted only if the Court has “overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.”<sup>24</sup> A motion for reargument is not an opportunity for a party to either rehash arguments already decided by the Court or present new arguments not previously raised.<sup>25</sup> Therefore, to succeed on such a motion, the moving party has the burden of demonstrating the existence of newly discovered evidence, a change in the law, or manifest injustice.<sup>26</sup>

7. Here, the Court has not overlooked controlling precedent or legal principles, nor has it misapprehended the law or facts such as would have changed the outcome of its decision on the motion to dismiss. What was at minimum implicit in its decision, the Court now makes explicit. While Section 8.18 of the Contribution Agreement survives to the Operating Agreement by its express language, the anti-assignment clause does not. Instead, Article 11 of the Operating Agreement governs transfers. Thus, the anti-assignment clause of the Contribution Agreement does not divest the Brovelli Trust of standing to bring this action.

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<sup>24</sup> *Janeve Co., Inc. v. City of Wilmington*, 2009 WL 2386152, at \*1 (Del. Super. July 24, 2009) (quoting *Reid v. Hindt*, 2008 WL 2943373, at \*1 (Del. Super. July 31, 2008)).

<sup>25</sup> See *Reid*, 2008 WL 2943373, at \*1 (citations omitted).

<sup>26</sup> *Id.*

8. Accordingly, the Defendants' Motion for Reargument is **DENIED**.

**IT IS SO ORDERED.**

/s/ Ferris W. Wharton  
Ferris W. Wharton, J.